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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1952
No. 816

J. R. CANTRALL and Jo G. CANTRALL, Doing Business as J. R. CANTRALL COMPANY and H. C. SMITH COMPANY,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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J. R. Cantrall and Jo G. Cantrall, Doing Business as J. R. Cantrall Company and H. C. Smith Company, petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on January 29, 1953. Petitioner's application for rehearing was denied by the Court on February 20, 1953.

Opinions Below.

The Decision and Order of the National Labor Relations Board is reported in 96 N. L. R. B., No. 124 [R. 79-87]. The opinion of the Court of Appeals [R. 364-370] is reported in 201 F. 2d 853.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 29, 1953. [R. 371-376.] Petition for rehearing [R. 376] was denied on February 20, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1250 (1).

Questions Presented.

1. Whether the businesses of Petitioners, here involved, affect interstate commerce within the meaning of that National Labor Relations Act, as amended so as to confer jurisdiction upon the National Labor Relations Board, and if so, will it effectuate the policies of that act for the Board to assert its jurisdiction.

2. Whether the Court of Appeals erred in holding that there was substantial evidence, on the record considered as a whole, to support the Findings and Conclusions of the National Labor Relations Board that petitioners interfered with, restrained and coerced employees and applicants for employment in violation of Section 8(a)(1) of the National Labor Relations Act, as amended.

3. Whether the Court of Appeals erred in holding that there was substantial evidence, on the record considered as a whole, to support the Findings and Conclusions of the National Labor Relations Board that petitioners discriminated in regard to hire and tenure of six persons to discourage membership in a labor organization in violation of Section 8(a)(3) of the National Labor Relations Act, as amended.

4. Whether the Court of Appeals erred in refusing to pass upon petitioners' contention that the case should have been dismissed for want of indispensable parties.

5. Whether the National Labor Relations Board afforded due process of law and constitutionally applied the provisions of the National Labor Relations Act, as amended.

Statute Involved.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V., Sec. 151, *et seq.*), are set forth in Appendix A, *infra*, pp. 1 to 6.

Statement.

Upon charges filed by the International Association of Machinists, a labor organization, the National Labor Relations Board issued a complaint against petitioners alleging the commission of unfair labor practices, affecting commerce, in violation of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, as amended, in that petitioners refused employment to six persons because they were members of the charging labor organization, the International Association of Machinists.

Petitioners denied all the material allegations of the complaint, and affirmatively alleged that the unfair labor practices, as charged, did not affect commerce within the meaning of the Act.

The charges of unfair labor practices arose in the recruitment, by petitioners, of employees to be engaged in the dismantling and reassembling of certain machinery used in the production of waxed paper.

Prior to any employment, the International Association of Machinists, the charging party, attempted to induce petitioners to enter into an illegal arrangement whereby petitioners were to agree to employ only members of the

Machinists' Union. [R. 208-209, 244-246, 327.] In these attempts, the Machinists' representatives did not make a demand for the employment of any of the persons cited in its charges against these petitioners. These attempts were all made prior to the engagement of any employees for this work and even before it had finally been determined that petitioners would, themselves, obtain a contract to perform the work in question. Not only did the Machinists' attempt to consummate this illegal arrangement, it sent one of its members to petitioners to be employed as a foreman of the project and thus to insure that only members of that union be employed upon the project. These attempts were abortive because petitioners became aware of the illicit purpose of the Machinists' representatives.[1]

Petitioners, upon ascertaining the illegal design of the Machinists, told its representatives that, in conformance to the universal custom of employment in the building and construction industry, that all persons to be employed, in the machinery dismantling and reassembling, would be hired by the foreman of that work on the job as jobs became available and that if the Machinists had members who wished to be employed, such members would, like all other applicants, have to present themselves to the hiring foreman for his consideration; that the judgment of the foreman, in such hiring, would be sufficient and if the

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[1]The payrolls introduced in evidence show that the preliminary work of laying out and planning was begun about March 1, 1950, and that such planning and engineering covered a period of about three weeks. The attempts of the Machinists to induce the illegal arrangement were begun in December of 1949 and continued up through February, 1950. [R. 122-125.]

applicant met the qualifications imposed by the foreman they could be successful.[2]

So, when the representative of Machinists, in furtherance of the improper scheme, sent six of its members to apply for jobs, at a time when employment had not begun, these six persons were, in like manner told that the hiring would be done by the foreman on the job after the necessity arose that personnel be employed for the machinery moving and assembling project. None of these six persons made applications to the foreman on the job, even though they were persons who had had a long experience in the building and construction industry and were well acquainted with the universal hiring practice of that industry. [R. 328, 320-321, 338.]

Instead of making applications to the foremen, according to the established practices and instructions and directions of petitioners, these six persons wrote letters of application to petitioner Cantrall, but in making these applications they neither mentioned their union affiliations nor that they had discussed employment with a representative of petitioner Cantrall. [R. 203, 221, 230, 238-239, 171, 176-177, 289.] These letters were written nearly

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[2]The established and universal practice, in the building and construction industry, is that the foremen, on the job, hire their own men, without the immediate direction of the general contractor or sub-contractor. Each foreman has a following of men that have worked with him over a period of years and when the foreman transfers from one job to another such personnel follows him, thus the foreman has a pool of men with whom, through experience he has become acquainted with their qualifications and skills. [R. 328.] Petitioners, as well as other general contractors in the industry, have found through experience that in order to have efficient job operation, the foremen must be entrusted to hire men of their own choosing. For, if the men are hired through a central hiring place, the contractor loses the efficiency of a well coordinated crew. [R. 320-321.]

a month before employment of personnel was commenced. [R. 256.][3]

Thwarted in its illegal purpose, the International Association of Machinists filed the charges, giving rise to the instant case. The essence of those charges, as well as the allegations of the Board's complaint, was that petitioners preferred employment to members of the United Brotherhood of Carpenters and Joiners of America rather than employment of members of the International Association of Machinists, and thus the six were denied employment because they were not members of the Carpenters' Union.

On February 7, 1950, at the instigation of Machinists' representatives, five of the six "discriminatees" went to the plant where the machinery project was to be and they had a conversation with the man, they testified, giving his name as "Cantrall." None of the applicants were able to identify this "Cantrall" as a partner or having any connection with petitioner Cantrall. Their testimony was that they asked this man if he was "Cantrall' and such person answered "Yes." [R. 165, 199-220, 218, 226, 235.] In their conversation with "Cantrall" only one of them revealed his name. [R. 206, 222, 231, 235.] The further substance of their testimony was to the effect that they told "Cantrall" they wanted employment on the machinery project, that they were machinists, whereupon "Cantrall" was purported to have said that he was sorry, that all his work was done by the Carpenters and that he was

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[3]When the six persons discussed employment possibilities with petitioner Cantrall only one of them identified himself by name. The evidence is clear that none of the others gave Cantrall any indication of their identification or where they could be reached when employment of men was started.

tied up by the Building Trades Contract and couldn't hire anybody but members of the Carpenters union to do his work. [R. 165, 200, 218-219, 235-236.][4]

All of the five admitted that it was clearly made plain to them that "Cantrall" was not doing the hiring, that any hiring of men for this particular project would be done by the foremen, on the job, after the foremen were selected and actually at work on the project and that at the time of the conversation no one had been employed and the time when the work, in question, would begin had not been determined. [R. 175-176, 206-207, 222, 231, 240-241.]

Thereafter these applicants sent letters to petitioner Cantrall as we have recited above. None of them applied to any foremen of petitioners on the job and none of them made any further effort to secure employment by petitioners.[5]

The Board, supported by the Court of Appeals, excuses the failure of these men to follow the established hiring practices of the industry because they deemed further application to have been meaningless and futile—that the failure of petitioners to seek out and offer employment to these men when jobs became available was attributable

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[4]The fifth man, Herman Stoekl, testified that "Cantrall" said that he, "Cantrall" couldn't hire them, that the foreman, on the job, was going to do the hiring and that "Cantrall" had no idea who the foreman would choose.

[5]Each of the five testified to his extensive experience in the building and construction industry [R. 163-164, 197-198, 215-216, 223-225, 232-233]. It is undisputed, that experience has taught the building and construction contractors, that the most efficient and well ordered job is accomplished by permitting the foremen to select their own subordinates, with a minimum of interference from higher management. [R. 320-321, 324-325, 327-330, 338-339, 205-315.]

to petitioners' discriminatory hiring practices rather than the applicants failure to pursue their quest for employment from petitioners' foreman, as petitioners assert the applicants should have done. Overlooked is the fact that this project and the applicants were in or near the City of Los Angeles, composed of over 2 million inhabitants and that the applicants did not identify or otherwise arrange for petitioners to know who they were or where they could be reached upon the availability of jobs. Therefore, because petitioners did not follow the procedure of hunting needles in the haystack of humanity, petitioners were refusing employment to these men for the reason that they were members of the Machinist Union, rather than members of the Carpenters' Union.

During the course of the machinery project, 32 persons were, altogether, employed in the types of work for which these men purportedly made application for employment, only 14 of these were shown to have been members of the Carpenters' Union. The union affiliation of the remainder was not proved.

In 1949, petitioners entered into an arrangement for the moving of certain machinery from a plant of Western Waxed Paper Company, at Los Angeles, where it had been in use for a period of from ten to twenty years [R. 321-322, 332, 128-130] to a new plant, at Los Angeles, which was being constructed by the H. C. Smith Company, as mentioned above.

According to the record, which petitioners will contend does not constitute probative evidence because the witness giving the information refused to testify as to its accuracy, The Western Waxed Paper Company, hereinafter called Western, is engaged in the manufacture and processing

of waxed papers used principally as wrappers for food products. [R. 95.] In 1949, Western had sales in excess of a million dollars and purchases in excess of the same amount [R. 100] 6.7% of such sales were made outside of California and 13.83% of such purchases were from outside California.

The Business of Petitioners.

Petitioner, H. C. Smith Company, is a general contractor, in building and construction of various types and sizes of commercial structures, all within the state of California. During 1949, it engaged in no business, performed no work and was connected with no enterprises located, or operating outside of the state of California. [R. 109-112.] All of the products, materials and supplies used by the Smith Company were obtained from sources within the state and the record does not show that any of the material products or supplies had an origination from outside California.

During this period, the aggregate gross business of the company amounted to $2,802,500 [R. 115], of this amount $1,700,000 represented the contract cost of a building which the Smith Company was constructing for Western Waxed Paper Company, a division of Crown-Zellerbach Corporation. None of the materials, products or supplies that went into the construction of the building had been received in interstate commerce. Admittedly, the Smith Company had not engaged in interstate commerce during the period mentioned.

Petitioner, Cantrall Engineering Company, is a partnership, composed of J. R. Cantrall and Jo G. Cantrall, which principally engaged as a sub-contractor, furnishing only

the labor supply for the work undertaken. [R. 181-188.] They specialize in the erection of the steel portions of building and bridges. Most of their jobs are small and of short duration. [R. 181.] The only enterprises, outside of the state of California, with which they were ever connected, were the erection of transmission towers in Arizona for the Bureau of Reclamation of the United States Department of Interior [R. 179], and some grain bins in Nebraska, for the Community Credit Corporation of the United States Department of Agriculture. [R. 180.]

The cost of the Arizona engagement was approximately $140,000 and the grain bins were valued at between $50,000 and $100,000. All of the materials used in these two projects were furnished by the federal government and there is no showing from whence they originated. Neither is there any showing that the completed jobs were in anywise connected with interstate commerce.

Upon this evidence the Board found that petitioners had discriminated in regard to hire and tenure of employment of the applicants to discourage membership in the Machinists' union in violation of Section 8(a)(3) of the National Labor Relations as amended and in so doing had also interfered with, restrained and coerced the applicants in violation of Section 8(a)(1) of that Act [R. 77-95], and applied to the United States Court of Appeals for a decree enforcing the Order of the Board to cease and desist in the unfair labor practices and to give back pay to the applicants. No order for reinstatement was

made because the work had been completed by the time of the hearing, before the Board, was held.

The Court below granted a decree of enforcement of the Order of the Board [R. 371-376], relying chiefly on its decisions and its prior opinions in *North Whittier Heights Citrus Assoc. v. N. L. R. B.*, 109 F. 2d 76, (C. A. 9), cert. den., 310 U. S. 632; and *N. L. R. B. v. Holtville Ice and Cold Storage Co.*, 148 F. 2d 168, 169 (C. A. 9).

Specification of Errors to be Urged.

The court below erred in holding that:

1. The National Labor Relations Board had jurisdiction to issue the complaint and entertain the proceeding.

2. There was substantial evidence to support the Board's conclusion that petitioners violated Section 8(a)(3) of the National Labor Relations Act, as amended.

3. There was substantial evidence to support the Board's conclusion that petitioners violated Section 8(a)(3) of the National Labor Relations Act, as amended.

4. It would effectuate the policies of the National Labor Relations Act, as amended, to enforce the Order of the National Labor Relations Board.

5. The National Labor Relations Board had afforded petitioners the requisite due processes of the law.

6. The complaint should not have been dismissed for want of indispensable parties.

Reasons for Granting the Writ.

1. The decision of the Court below in the instant case is directly in conflict with the principle established in the decision of the Court of Appeals for the Sixth Circuit, in *N. L. R. B. v. Bill Daniels, Inc.*, 202 F. 2d 579 (decided January 20, 1953).

The Sixth Circuit was there dealing with a question as to whether a company, which bought all of its materials and supplies within a state and sold all of its products within the same state was engaged in a business affecting commerce within the meaning of the National Labor Relations Act. Briefly, *Bill Daniels, Inc.*, was a dealer selling Ford automobiles in the state of Michigan. Daniels purchased all of the automobiles from Ford which had manufactured and assembled them within the state. More than one-half of the parts and accessories sold by Ford to Daniels came from plants located outside of the state of Michigan. All parts purchased by Daniels from Ford were obtained by Ford from independent manufacturers, not affiliated with Ford, most of whom were located outside of the state of Michigan. Ford and its dealers operated under sales agreements which do not make the dealer an agent or employee of Ford.

The Sixth Circuit denied enforcement of a Board Order, holding that Daniels and other dealers were clearly not engaged in interstate commerce, saying, *"The circumstances that these dealers made all their purchases in Michigan and practically all their sales in Michigan is the controlling fact of the case."* (Emphasis ours.) Further declaring that to do differently would obliterate the boundary between state and nation and that the constitutional term "interstate commerce," would lose its meaning. (Cit-

ing *N. L. R. B. v. Jones and Laughlin Steel Co.*, 301 U. S. 1.)

In addition the Sixth Circuit held that these dealers were not an integral part of Ford's multistate enterprise and in order to so hold it would be necessary for the record to show that the dealers were either employees or agents of Ford, a showing which was absent from the record.

The Sixth Circuit summed up by stating:

> "The controlling question is whether the clearly *local transactions* handled within the state, affect, interfere with or injure interstate commerce . . . If there is any connection between these local operations and interstate commerce it is too remote to subject these respondents to the operation of the Act."
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> * * * * * * * *
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> "No substantial part of respondents activities relate to goods moving in the channels of interstate commerce. If the line to be drawn anywhere in support of the intention of congress to leave local business to the protection of the state it must be drawn here."

While the petitioners are not automobile dealers, they are, like the respondents in the *Daniels* case, *engaged in a purely local operation.* The Smith Company in addition to constructing the building, admittedly local, was also, along with Cantrall, engaged in moving machinery which had been in the state of California ten to twenty years, and of itself, had clearly lost any elements of interstate transportation if any ever had existed. Smith Company, uncontrovertedly, did not make any purchases from outside California, and it did not make any sales outside that state. The materials, products and supplies used by Smith

Company in its construction of the building were not shown to have had any origination from without the boundaries of California. Similarly, there was no showing that Smith Company had ever engaged in any business of any nature out of the state.

Cantrall, principally a sub-contractor, to general contractors, supplies labor and experience. It purchases no materials nor does it make any sales. It deals primarily in services. With the exception of the two remote and isolated engagements in Arizona and Nebraska, Cantrall has confined all of its operations within the geographical limits of California.

Here, as in the *Daniels* case, the "circumstances that these [petitioners] made all their purchases in [California] and . . . all their sales in [California] is the controlling fact of the case." Added to this consideration is the uncontradicted fact that the machinery moved had undoubtedly come to rest within California and had shed any aspect of any interstate character it may have once had, the purely localization of the work involved becomes glaringly apparent.

As in the *Daniels* case, no substantial part of petitioners activities relate to goods moving in the channels of interstate commerce, and the intention of congress to leave local business to the protection of the states must be given judicial cognizance and petitioners purely local operations must be held not to be covered by the provisions of the National Labor Relations Act, as amended.[6]

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[6]See, also, Petition for Writ of Certiorari, *Howell Chevrolet Company v. N. L. R. B.*, October Term, 1952, No. ....., and the Reply of the National Labor Relations Board admitting the conflict of decisions and suggesting the granting of certiorari to review the question of immunity of local enterprise from the regulations of the National Labor Relations Act, as amended.

There are further apparent conflicts with decisions of other Courts of Appeal.

The Seventh Circuit has held in *Western Cartridge Co. v. N. L. R. B.*, 139 F. 2d 885, that to constitute discrimination violative of the Act there must be substantial evidence that allegedly discriminatory conduct has as its purpose the encouragement or discouragement of membership in any labor organization and that a mere formal statement of the Board that the conduct discourages membership in a labor organization, as it did here, is not an adequate substitute for the evidential deficiency. As we have indicated above, if these applicants had made application to the foreman in the manner they had been instructed, the probabilities are that they would have been employed, for as we show, *infra*, 18 of the employees engaged to do the work in question were not shown to have had membership in any labor organization, and only 14 of them were shown to have been members of the Carpenters' Union. Thus it appears that *union membership was not a prerequisite condition to employment.*

Similarly, the Fifth Circuit in *Stonewall Cotton Mills, Inc. v. N. L. R. B.*, 129 F. 2d 629, held that the provision against discrimination:

> ". . . does not, of course, mean that membership . . . in a union is a guarantee against lay-off promotion, or discharge. An employee, though he belongs to . . . a union, may, like any other employee, be [refused employment] for any reason or for no reason at all, unless it is for a reason prohibited by the Act . . . To make out a case [of violative discrimination] it must appear [affirmatively] that the employer has by its discrimination in regard to

> hire, etc., encouraged or discouraged membership in any labor organization. This requires proof of both the purpose and effect of the action under review."

On the basis of the foregoing, the Fifth Circuit denied enforcement of a Board order which had found discrimination because the evidence did not support the finding that the discrimination was to encourage or discourage membership in any labor organization. The decision of the Court below makes no conclusions with respect to whether the discrimination which it found had a purpose or that there was proof of discrimination to encourage or discourage membership in any labor organization, and indeed in the face of the evidence of the lack of membership showing 18 of the employees such a conclusion would have been contrary to the evidence.

The decision of the Second Circuit, in *N. L. R. B. v. Air Associates,* is to the same effect as the decisions of the Fifth and Seventh Circuits, just cited and presents the same substantial conflict, as those cases, with the decision below.

2. The decision of the Court below is believed to be erroneous and the conflicting decision of the Court of Appeals in *N. L. R. B. v. Bill Daniels, Inc., supra,* correct. Moreover, the decision below probably conflicts with the applicable decisions of this Court.

In *N. L. R. B. v. Jones & Laughlin Steel Corporation,* 301 U. S. 1, Chief Justice stated at page 31:

> "The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce.

> It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds."

Chief Justice Hughes continued at page 37:

> "Undoubtedly the scope of this power [of Congress over intrastate activities] must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

Moreover, if construed in accordance with the opinion of the Court below in this case, the constitutional term "interstate commerce" will lose its meaning and the boundary between state and nation will be obliterated. As stated by Judge Stephens in his concurring opinion in *N. L. R. B. v. Howell Chevrolet Company*, ... F. 2d ....., (referred to in footnote 6), in the Court below:

> "I remain unconvinced . . . that a simple business transaction within a state is interstate commerce because of a fine-spun tracing of a remotely possible and immeasurable relation to trade across a state line."

3. There is a further probable conflict between the opinion below and the applicable decisions of this Court. The essence of this Court's opinions in *Pittsburgh S. S. Co. v. N. L. R. B.*, 340 U. S. 498; and *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, was that Board decisions, to be held supportable, must have been decided

on the record considered as a whole as the statute provides. (61 Stat. 136, 29 U. S. C. Supp. V., 160(e).)

The Court below and the Board disregarded portions of the record on the question as to union membership of the persons employed to do the work of machinery moving and held there was no evidence that persons, "who were not members of the [Carpenters' Union] were also employed for this work" [R. 82, footnote], whereas the uncontradicted evidence is that of the thirty-two persons employed to do the work in question, only 14 of them were shown to be members of the Carpenters' Union. [R. 297-300, 251-277.]

This undisputed evidence forcefully rebuts the conclusion that it was petitioners' policy to hire only members of the Carpenters' union and sustained the contention of petitioners that requirement of membership in the Carpenters' union was not a prerequisite condition of employment. The Court and the Board, apparently gave no consideration to this compelling and decisive evidence and was unaware that it was in the record.

The Court below relied upon its former decisions in *North Whittier Heights Citrus Assoc. v. N. L. R. B.*, 109 F. 2d 76, cert. den., 310 U. S. 632, and *N. L. R. B. v. Holtville Ice and Cold Storage Co.*, 148 F. 2d 168, as its guide to test the substantiality of the evidence and the correctness of the procedures and findings of the Board. Those decisions were decided many years before the Taft-Hartley amendments, which, as this Court held in the *Universal Camera* and *Pittsburgh S. S.* cases, gave to the reviewing courts more responsibility in reviewing decisions of the Board than was being exercised at the time of the lower courts in the *North Whittier Heights*

and *Holtville Ice* decisions. *Universal Camera* and *Pittsburgh S. S.* negatives the type of substantial evidence test used in the cases relied on by the Court below and renders those decisions no longer a controlling precedent. It is submitted that the Court below should have relied upon its decision in *N. L. R. B. v. Citizen-News Co.*, 134 F. 2d 970, as authority that the record did not contain substantial evidence to support the findings of discrimination. Certainly, the Court below did not follow the instructions of this Court given in the *Universal Camera* and *Pittsburgh S. S.* cases.

The Importance of the Question Nationally.

4. Clearly the questions presented are of importance in the administration of the National Labor Relations Act, as amended. The decision of the Court below, if left to stand, will affect all business of a local nature, especially the construction of buildings of all types and take from such enterprises the protection of state sovereignties which our dual system of government insures to the states and their citizens.

Settlement of the questions here presented, by this Court is plainly in the public interest since they or some of them are likely to be presented in almost all of the cases involving construction of localized edifices and in cases where the National Labor Relations Board assumes to take jurisdiction over employers such as petitioners here.

Other cases, such as this are now before the Board in varying stages of process or are in the process of being presented to other Courts of Appeals to determine the constitutional and applicable questions involved in the statutory provisions considered.

The importance, of having this Court, set forth its opinion on the necessity of proof that the alleged discrimination must have an effect upon encouragement or discouragement of union membership is vitally urgent, for as in the case at bar, this consideration is not always accompanied by any evidence of encouragement or discouragement of union membership.

Equally important is the necessity of having this Court pass upon the failure or refusal of the Court below to take cognizance of the absence of proof that all employees in the project involved were members of the Carpenters' Union.

Further, the Court below, apparently ignored petitioners' contention that the case should have been dismissed for want of indispensable parties. The original complaint alleged that the discriminations charged against petitioners were under the "color of a Master Labor Agreement, entered into by the Associated General Contractors and the Los Angeles Building and Construction Trades Council . . ." and petitioners refused to employ the six persons . . . because they were not members of an affiliate of the Los Angeles Building and Construction Trades Council. [R. 5-6.] The Associated General Contractors and Los Angeles Building and Construction Trades Council had a master labor contract which was introduced into evidence. [R. 135-145, 134.] That the Associated General Contractors and the Los Angeles Building and Construction Trades Council were indispensable parties admits of no challenge. *Greens v. Brophy,* 110 F. 2d 539, 541, (opinion by the Chief Justice while a District Judge). Equally clear is the fact that neither the Associated General Contractors nor the Los Angeles

Building and Construction Trades Council were given notice or an opportunity to be heard upon the question of the validity of their contract or that the contract was inducive of the discriminatory practices which the Board found petitioners had committed due to a hiring policy established pursuant to the policy of that contract.

There is here not only a legal interest, but a beneficial interest on the part of the Associated General Contractors and the Los Angeles Building and Construction Trades Council to see that their contract is properly administered and interpreted. An interpretation and application of that interpretation, in the absence of the contracting parties, leaves open to further litigation by those parties themselves as to the correctness of the interpretation or application of those contractual provisions.

It is no answer, as the Board contends, that it seeks no order against the absent parties. It is likewise no answer that petitioners are to be punished because of improper applications of the aforementioned contract because petitioners were constituent components of the Associated General Contractors. The individuals cannot be separated from the whole, and even though that were possible, the Associated General Contractors, as a contracting party, cannot be deprived of their legal rights to protect the provisions and applications of their contract. These tenents have been put forth in *Consolidated Edison Company v. N. L. R. B.*, 305 U. S. 197, and have never been overruled.

We submit this Court's statement in the *Consclidated Edison* case, that:

> ". . . the established practice of a court of equity to dismiss the plaintiff's bill, if it appears that the

grant the relief prayed would injuriously affect persons materially interested in the subject matter, who are not made parties to the suit, is founded upon clear reason, and may be enforced by the court *sua sponte* . . . ," is cogently applicable here.

See also, *Morgan v. United States,* 304 U. S. 1, 21, 22, and *Federal Communications Commission v. Pottsville Company,* 309 U. S. 134.

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

MAURICE J. NICOSON,
ARTHUR GARRETT,

Counsel for Petitioners.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended, (61 Stat. 136, 29 U. S. C. 141, Supp. V, Sec. 151 *et seq.*) are as follows:

"DEFINITIONS"

"Sec. 2. When used in this Act * * *

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory or between points in the same State but through any other State or Territory or the District of Columbia, or any foreign country.

"(7) The term 'affecting commerce' means in commerce or burdening or obstructing commerce or the free flow of commerce or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

UNFAIR LABOR PRACTICES

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominated or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited

from permitting employees to confer with him during working hours without loss of time or pay;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; [and (ii) if, following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:] *and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9(f), (g), (h), and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization . . ."

* * * * * * * * *

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the

said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * * * * * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the plead-

ings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to

questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

Office - Supreme Court, U.S.
FILED
JUN 10 1953
HAROLD B. WILLEY, Clerk

8494

No. 816

In the Supreme Court of the United States

OCTOBER TERM, 1952

J. R. CANTRALL AND JO G. CANTRALL, D/B/A J. R. CANTRALL COMPANY, AND H. C. SMITH COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court below (R. 364-370) is reported at 201 F. 2d 853. The findings of fact, conclusions of law, and order of the Board (R. 79-85, 18-78) are reported at 96 NLRB 786.

JURISDICTION

The judgment of the court below (R. 371-376) was entered on January 29, 1953. A petition for

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rehearing was denied on February 20, 1953 (R. 376). The petition for writ of certiorari was filed on May 20, 1953. The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether the Board properly found that petitioners' operations affect interstate commerce within the meaning of the National Labor Relations Act, as amended.

2. Whether, as the court below held, substantial evidence on the record considered as a whole supports the Board's finding that petitioners discriminatorily denied employment to six applicants in violation of Section 8 (a) (3) and (1) of the Act.

3. Whether petitioners were denied due process of law by the Board's refusal to dismiss the complaint for an alleged want of indispensable parties.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in the Appendix to the petition, pp. 1-6.

STATEMENT

I. The Board's Findings of Fact

Briefly, the Board found that petitioners were engaged in commerce within the meaning of the Act and that they had violated Section 8 (a) (1) and (3) of the Act by refusing to hire six members of the International Association of Machin-

ists, herein called Machinists, because of their policy to hire only members of the United Brotherhood of Carpenters and Joiners, herein called Millwrights (R. 79-81). The Board's subsidiary findings of fact and the supporting evidence may be summarized as follows:

A. *The business of petitioners*

Petitioner H. C. Smith Company, herein called the Smith Company, is a California corporation engaged in the construction of large industrial plants principally in the southern California area (R. 22; 109). The aggregate value of contracts performed by the Smith Company in 1949 was $2,802,500, of which $1,700,000 was for the erection of a manufacturing plant in Los Angeles for the Western Waxed Paper Company Division (herein called Western) of the Crown Zellerbach Corporation (R. 22; 111-112, 113, 115-116).

In addition to being general contractor for Western's new plant in Los Angeles, the Smith Company also contracted with Western late in 1949 to move machinery from Western's old plant in Los Angeles to the new plant (R. 28; 127, 128-130). In contemplation of obtaining the contract for moving the machinery the Smith Company entered into an agreement in June 1949 with petitioner J. R. Cantrall Company (a partnership composed of J. R. Cantrall and Jo G. Cantrall, specializing in steel erection work as subcontractors for various general contractors) covering the proposed movement of machinery for Western (R. 23, 32; 128-

130, 178, 183).[1] The parties to this agreement termed their undertaking a "joint venture" (R. 28; 129). The contract for movement of this machinery was awarded to the Smith Company and the contract price for the work was $59,000 (R. 28-29; 339).

Western is engaged primarily in the manufacture of industrial wax papers at its plants at Los Angeles and San Leandro, California, and North Portland, Oregon (R. 26-27; 95-96). The sales of Western's Los Angeles plant in 1949 approximated over $1,000,000, of which amount $70,000 represents out-of-state sales (R. 27; 98, 100-102). Out-of-state purchases in 1949 totaled at least $130,000 (R. 27; 98, 100-102). Western's Los Angeles plant obtains some of its products and supplies from other divisions of Crown Zellerbach, principally from the plants at Camas, Washington, and West Linn, Oregon. Between 250 and 300 people are employed at Western's Los Angeles plant (R. 27-28; 101-102).

From the foregoing facts the Board found that Western was engaged in commerce at its Los An-

---

[1] In addition to its work on the Western construction, the Cantrall Company carried on simultaneously two projects during 1949 outside the State of California, the erection of transmission towers in Arizona for the Bureau of Reclamation of the United States Department of the Interior, and the erection of grain bins in Nebraska for the Commodity Credit Corporation (R. 23-24; 178-181). The value of the Bureau of Reclamation contract was $140,000 and the ultimate value of the contract with the Commodity Credit Corporation was between $50,000 and $100,000 (R. 24; 179, 184). Cantrall Company's total business in 1949 was between $350,000 and $400,000 (R. 25; 188).

geles plant and that the construction and installation activities of both petitioners at that plant were necessary to its continued operation and production. Consequently the Board concluded that it would effectuate the policies of the Act to assert jurisdiction in the instant case (R. 29-31).

B. *The unfair labor practices*

1. Representatives of the Machinists attempt to negotiate with petitioners for jobs

The contract to move and install Western's machinery was awarded to petitioner Smith Company prior to mid-November 1949 (R. 34; 208-209). By the terms of the Smith Company's contract with the Cantrall Company all personnel for this job were to be carried on the payroll of the Smith Company (R. 33; 128-130). The erection, fitting, and installation of the machinery at the new plant required the services of mechanics skilled in this particular type of work (R. 36; 190, 244-246). This installation and alignment work is a type of work done both by members of the Millwrights and by members of the Machinists (R. 36; 190, 244-246).

During the first week of December 1949, Al Smith, business representative of Lodge 311 of the Machinists, advised Bryce Horn, secretary-treasurer of the Smith Company, that he had heard that the Smith Company had received the contract to move Western's machinery (R. 38; 208-209, 327). Horn said this was true but that as yet he did not know whether his Company would employ the men

or sublet the work (R. 39; 209). Horn then asked "if the Machinists were affiliated with the AFL," and Smith replied, "not at present" (R. 39; 209). Horn further inquired if the Machinests "were a part of the Building Trades Council," and Smith said they were not (R. 39; 209). Thereupon Horn stated that H. C. Smith Company was "a signatory to the A.G.C. contract and that they would probably have to employ * * * members of an organization that was affiliated with the Building Trades Council" (R. 39; 209).[2] Smith proceeded to inform Horn that the Machinists had men qualified for the work involved and that he would like to send them in for an interview (R. 39; 209). At this point Horn told Smith that if Machinists were employed on the job the "carpenters and the other [AFL] building crafts [would] quit" (R. 39; 209). Smith advised Horn that under law his Company was protected in its right to hire anyone it deemed qualified to do the work (R. 39-40; 209). Horn finally promised to call Smith when he learned how the men would be hired, but Smith never heard from Horn (R. 40; 210).

[2] The contract to which Horn referred is the Master Labor Agreement between the Associate General Contractors (A.G.C.) and Building Contractors Association of California and the A. F. L. Building and Construction Trades Unions to which the Los Angeles Building and Construction Trades Council, among others, was a signatory. The Carpenters Union, which includes Millwrights, was also a signatory to this agreement and a member of the Los Angeles Building Trades Council (R. 39, fn. 10; 135-144, 313-314). Petitioners have at no time contended during this litigation that the contract required them to deny employment to nonmembers of the signatory unions, or that it met the requirements of a valid union security contract under Section 8 (a) (3).

On the morning of January 12 or 13, 1950, Floyd E. Smith and Al Smith, both representing the Machinists, went to the office of petitioner Cantrall Company and there saw J. R. Cantrall (R. 41; 317). Floyd E. Smith advised Cantrall that the Machinists had a number of qualified experienced men who were interested in working on Cantrall's installation job with the Smith Company and that they would supply him with names of these machinists so that he could interview them (R. 42; 211-212, 245-246). Cantrall replied that "he was sorry [they] came out to his place because he wouldn't be able to do /them/ any good." He stated that "the H. C. Smith Company is a signatory * * * of the AGC agreement between the contractors and the Building Trades Council" which "govern[s] the contractors in hiring men for the job," and that to hire Machinists would cause "the building trades crafts [to] walk off the job" (R. 42; 245-246). After Floyd E. Smith argued that no union had the right to tell an employer that he could not hire a certain craft or a certain man because he was a member of another labor organization, Cantrall remarked that "it was strange * * * to hear a labor organization representative make such a statement" (R. 42; 246). Cantrall conceded that he could get better qualified men from the Machinists than from the Millwrights but because of the manner in which "he got his contract * * * he was almost bound to hire people who were members of the Building Trades Council" (R. 44; 212). At this time Cantrall told the Smiths that nobody had

been hired on the job as yet, that the hiring would be done by the Cantrall Company, and that the job would get underway in the latter part of February (R. 44; 245; 248).

Floyd E. Smith called J. R. Cantrall about January 17, and was told by Cantrall at this time that he definitely was going to use the millwright members of the Carpenters on the job, because "there would be too much trouble and a tie-up of the work if he hired members of the International Association of Machinists" (R. 44; 248).

2. Machinists apply for work on the Smith-Cantrall project

a. Chester L. Inwall

Inwall, a member of the Machinists, has had more than 25 years experience in the construction, erection, and repair of machinery (R. 47; 147-149). In December 1949, Inwall, having learned that the Smith Company had the contract for the Western machinery, applied to H. C. Smith, president of the Smith Company, for employment stating his qualifications (R. 47; 148-149, 152-153, 160-161). H. C. Smith told Inwall that he himself did not do any direct hiring of this nature, but he advised Inwall to write him a letter setting forth his qualifications and the letter would be referred to whoever was in charge when the project got under way (R. 48; 152). Inwall mailed the suggested letter to H. C. Smith but received no reply (R. 48; 155-157).

Sometime in January 1950, Inwall learned of the Cantrall Company's connection with the job. To-

gether with several other members of the Machinists, Inwall went to Cantrall's office where he and Winchance, a Machinist, talked to J. R. Cantrall (R. 48; 152-153, 160-162). Inwall told Cantrall of their qualifications as machinists and that they desired employment doing machinery installation at the Western plant (R. 48-49; 153). During the course of the conversation Cantrall asked Inwall, "Are you fellows millwrights?" Inwall replied "Now, what do you mean by millwrights? If you mean do we do millwright work, I say yes. If you mean do we belong to the Millwrights organization, * * * no, we are Machinists." Cantrall then told them that "in that case" he could not use them, that he would like to because the machinists were usually more capable than the millwrights, but that "I have a contract * * * on this job which is based on the AGC contract * * * if I was to put you fellows on this job, the carpenters would all walk off of it." Inwall then asked if the only reason Cantrall would not consider them was their union affiliations, and Cantrall replied "As long as you put it that way, that is exactly the way it stands * * * I am sorry, but I haven't any choice in the matter." (R. 50; 153-155.)

b. Walter A. Chunas, Jack C. James, Wendell L. Turnbow, A. T. Scott, and Herman P. Stoekl

On February 7, 1950, each of the above named persons, all with considerable skill and experience in assembling, erecting, and aligning machinery in large industrial plants, conferred with Jo G. Can-

trall at the new Western plant and there made application for employment (R. 51; 164-165, 167-169, 198-200, 216-219, 225-228, 232-237). No one had been hired for the job at the time these men applied for work (R. 52; 168). All the applicants were members of the Machinists and all were unemployed (R. 52; 198, 227, 235).

Cantrall told the five applicants he could not hire them "Because it is a building trades job," and "H. C. Smith had a contract with the building trades * * * if he [Cantrall] hired machinists on the job [it] would probably be tied up and he couldn't tie the job up by hiring machinists" (R. 53; 235, 237). In answer to a question from one of the group Cantrall said he would rather hire Machinists than Millwrights for the job "because he felt they were more suited to that type of work" (R. 53-54; 236). At the close of the conversation Cantrall stated that the work would start in a week or two and that his foreman, a member of the Millwrights Union, would do the hiring through the Millwrights Union (R. 54; 201, 241).

Subsequent to the applications made in person by the above group each applicant renewed his application for employment by means of a letter. Those letters were sent to the Cantrall Company between February 13 and 15, 1950 (R. 57; 203, 221, 230, 238-239, 289-290).

c. Gilford J. Colvin

Colvin, a Machinist with considerable skill in the erection and installation of machinery, was unem-

ployed when on February 8, 1950, accompanied by Joseph Smith, another member of the Machinists, he applied for work at the project (R. 54-55; 280, 282, 283-286). Jo Cantrall advised Colvin and Smith that he was not hiring anyone at the time (R. 56; 284). When Colvin remarked that at least their applications were in early, Cantrall replied that unless they were members of the Millwrights Union he could not hire them, stating that if he hired Machinists "there was a fear of Building Trades closing down the job" and that the Cantrall Company "couldn't and wouldn't [hire Machinists] because they didn't want to go against the policy set by their general contractor" (R. 56; 284-285). Colvin subsequently applied for employment on the Western job by a letter addressed to the Cantrall Company which was received on February 15, 1950 (R. 57; 291-292).

On February 28, 1950, Colvin stopped at the Cantrall Company's yard in Compton, California, and again asked Jo Cantrall for employment (R. 56; 286). Cantrall told Colvin that he could not and would not hire Machinists because the job "was all tied up with the Millwrights" and that "he would have liked to hire Machinists on the job, but he was unable to do so" (R. 57; 286-288).

3. Petitioners hire only members of the Millwrights for the job

The hiring of mechanics to do the machinery installation work began with the hiring of O. Sharplin, a member of the Millwrights, as foreman, on

February 24, 1950. From that time until May 24, 1950, when installation work was completed, petitioners employed a varying number of mechanics (R. 58-59; 297-300, 307-308, 312). Payroll records show the following numbers of Millwrights union members working on these dates: March 1, 15; March 15, 11; March 22, 13; April 5, 17; April 19, 18; April 26, 18; May 11, 17; May 17, 10; and May 24, 6 (R. 37; 131-132, 251-277). So far as the records show, no member of the Machinists was employed on the job; petitioners offered no evidence to show that persons other than members of Millwrights were employed for this work (R. 59, 81-82, n. 6; 251-277, 297-300).

4. The Board's conclusions as to petitioners' refusal to hire Chunas, James, Turnbow, Scott, Stoekl, and Colvin

Upon the foregoing facts, the Board found that petitioners violated Section 8 (a) (3) and (1) of the Act by denying employment to Chunas, James, Turnbow, Scott, Stoekl, and Colvin because of their discriminatory policy of hiring as mechanics only members of the Millwrights Union (R. 79-80).[3] The Board concluded that petitioners violated the Act when the applicants initially applied for employment and petitioners' discriminatory policy was communicated to them, and that the violation continued when jobs became available three weeks later (R. 67).

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[3] The Board's order does not include Inwal, since his name does not appear in the complaint (R. 3-7, 61).

II. The Board's order

The Board's order (R. 83-85) requires petitioner companies to cease and desist from either discouraging or encouraging membership in any labor organization by refusing to hire and employ properly qualified applicants, or in any other manner interfering with, restraining, or coercing applicants or employees in the exercise of rights granted them under Section 7 of the Act.

Affirmatively the order directs petitioners to make whole the discriminatees for any loss of pay and to post the usual notices.

III. The decision of the court below

The court below, enforcing the Board's order in full, rejected petitioners' contention that the Board's finding that petitioners' operations affected commerce within the meaning of the Act was not supported by substantial evidence and that assertion of jurisdiction would not effectuate the purposes of the Act (R. 365-368). Secondly, the court below found that "From a consideration of the whole record we are left with the conviction that the Board's finding that [petitioners so discriminated in favor of the Millwrights, insofar as applications for employment by six members of the Machinists are concerned, is amply supported." (R. 368). A petition for rehearing, urging, *inter alia*, that the complaint should have been dismissed for want of indispensable parties, was denied. (R. 376.)

ARGUMENT

1. The Board properly asserted jurisdiction over petitioners. As noted above, p. , petitioners at the time the unfair labor practices occurred were engaged in constructing, and installing machinery in, Western's plant. Western conducts a substantial interstate business (*supra*, p.); consequently, any labor dispute arising out of the construction or installation work performed by petitioners would have tended seriously to hamper Western's interstate operations and plainly would have affected commerce within the meaning of the Act. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197; cf. *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, 661-662, 665; *Martino* v. *Michigan Window Cleaning Co.*, 327 U.S. 173, 175-177; *Kirschbaum Co.* v. *Walling*, 316 U.S. 517, 525, 526; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 14; *Thomas* v. *Hempt Bros.*, 345 U.S. 19. See also, *National Labor Relations Board* v. *Fainblatt*, 306 U.S. 601; *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 683-685; *Polish National Alliance* v. *National Labor Relations Board*, 322 U.S. 643, 647-648. Contrary to petitioners' contention (Pet. pp. 12-14), the ruling below does not conflict with the decision of the Court of Appeals for the Sixth Circuit in *National Labor Relations Board* v. *Bill Daniels, Inc.*, 202 F. 2d 579, pending on petition for certiorari, No. 813 this Term. In that case the court concluded that the operations of an automobile dealer whom it viewed

as a local retailer of goods that were purchased and sold within the state, did not substantially affect commerce. Although we believe that the court was mistaken in its view of the employer's operations and its conclusion (see Board's Pet. for cert. pp. 15-20), the case as decided by the Sixth Circuit is distinguishable from the instant case. Here, petitioners were engaged in performing construction and installation services essential to the operation of an interstate enterprise. Their activities in this respect clearly cannot be assimilated to those of a local retailer of goods.

2. Questions 2 and 3 of the petition (Pet. p. 2), involving the substantiality of the evidence supporting the Board's findings, do not present issues appropriate for consideration by this Court for, save in exceptional circumstances not present here, that is "a question which Congress has placed in the keeping of the Courts of Appeals." *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. But, this consideration aside, petitioners' contention that the record fails to support the Board's finding, approved by the court below, that they discriminated against employees in violation of Section 8(a)(3) and (1) of the Act overlooks the evidence summarized above, pp. , that petitioners refused to employ members of the Machinists Union solely because of their policy of hiring as mechanics only members of the Millwrights Union. It is well settled that discrimination in hiring solely by reason of the applicant's membership or non-membership in a

union is one of the principal evils which the Act was designed to remedy. *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 182, 185-187.[4] It is difficult to conceive of a situation more calculated to encourage membership in a labor organization in violation of the Act than the one presented here where petitioners frankly informed applicants for work that only members of the Millwrights Union would be hired (*supra,* pp.).

Petitioners' suggestion (Pet. p. 15) that an "apparent conflict" exists between the decision here in this respect and the cases cited at pp. 15-16 of the petition lacks merit. In the *Western Cartridge* case, 139 F. 2d 855 (C.A. 7), the court simply held that the record failed to establish that an employer who undertook to discipline employees, who had engaged in a "wild cat" strike not authorized by the union and who were not purporting to act as union members, had discriminated against employees for the purpose of discouraging membership in the particular union. 139 F. 2d at p. 860. In the *Stonewall Cotton* case, 129 F. 2d 629 (C.A. 5), the court, as its opinion on rehearing demonstrates (129 F. 2d at p. 633), held, consistent with

[4] Petitioners' suggestion (Pet. p. 15) that if the employees here in question "had made application to the foreman in the manner they had been instructed, the probabilities are that they would have been employed * * *" is insubstantial. As the Board pointed out (R. 81), "Plainly the applicants had no reason to believe that * * * the foremen were not governed by the [petitioners'] announced employment policy. Instead, it appears that these officials gave implicit effect to this policy and hired only members of the Millwrights Union to perform the work in question" [Footnote omitted].

the decision here, that the Board may properly conclude that discrimination against employees solely by reason of their union membership tends to discourage membership in the union in violation of Section 8(a)(3) of the Act. Petitioners' reliance on the *Air Associates* case, 121 F. 2d 586 (C.A. 2) also stems from an "erroneous impression" (*National Labor Relations Board* v. *Cities Service Oil Co.*, 129 F. 2d 933, 937 (C.A. 2)) of the holding in that case. As the Court of Appeals for the Second Circuit subsequently explained, in the *Air Associates* case, unlike the instant case, "there was no evidence and no finding from which an inference could possibly be drawn that the discharge of employees (not known by the employer to be union members) in order to reinstate employees, previously discharged, could conceivably discourage membership in a union, in violation of § 8(3) of the National Labor Relations Act * * *." *Perkins* v. *Endicott Johnson Corporation*, 128 F. 2d 208, 222, n. 51. In short, the alleged conflict does not exist.

3. The Board and the court below properly rejected petitioners' further contention (Pet. pp. 20-22) that the complaint should have been dismissed because of the failure to join as parties the Associated General Contractors and the Los Angeles Building and Construction Trades Council who were parties to a Master Labor Agreement "under color of" which, the complaint alleged, petitioners had discriminated against the applicants for employment (R. 5; see n., *supra*). But

the complaint did not challenge validity of the contract. As the Board noted (R. 82) "neither the validity of the contract nor the correctness of [petitioners'] interpretation is in issue," and the Board's order does not in any way affect the contract or the rights of the Associated General Contractors or the Building Trades Council. In these circumstances the claim of non-joinder of indispensable parties is unfounded. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, 271; *Consolidated Edison Company of New York, Inc.* v. *National Labor Relations Board*, 305 U.S. 197, 233.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

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